1990

State of Utah v. William Robert Cummins : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 20041-CA IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 900149-CA
v.	:	
WILLIAM ROBERT CUMMINS,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF ONE COUNT OF SECOND DEGREE MURDER, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-203 (SUPP. 1990), THE FIRST JUDICIAL DISTRICT COURT IN AND FOR BOX ELDER COUNTY, STATE OF UTAH, THE HONORABLE F.L. GUNNELL, JUDGE, PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of second degree murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (Supp. 1990). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1990), because the case was transferred from the Utah Supreme Court on August 31, 1990.

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did defendant preserve his claim of prosecutorial misconduct for appellate review? Generally, a contemporaneous objection is required before an appellate court will review a claim on appeal. State v. Johnson, 774 P.2d 1141, 1144 (Utah 1989). A motion for mistrial after the conclusion of closing argument does not serve as a contemporaneous objection which preserves an issue for review. State v. White, 577 P.2d 552, 555 (Utah 1978). Alternatively, did the statements of the prosecutor constitute plain error which this Court should review in spite of the waiver? The two prong test of plain error is 1) whether the

error should have been obvious to the trial court; and 2) whether the error was harmful. State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, 110 S.Ct. 62 (1989).

2. Did the trial court abuse its discretion by the manner in which a private investigator was provided for defendant and by denying defendant's request to appoint a psychiatrist to assist in his defense? A request for appointment of an investigator is to be addressed first to the county; if the county refuses to act, defendant can seek a writ of mandamus in court for appointment. Washington County v. Day, 22 Utah 2d 6, 447 P.2d 189, 192 (1968).

3. Did the trial court properly deny defendant's motion for continuance? The granting of a motion to continue is within the discretion of the trial court. State v. Creviston, 646 P.2d 750, 752 (Utah 1982).

4. Did trial counsel provide constitutionally effective assistance to defendant? To establish ineffective assistance of counsel, defendant must demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687 (1984).

5. Did the trial court properly instruct and guide the jury as to the points of law pertinent to this case? The trial court has the duty to instruct the jury on the law applicable to the facts of the case. State v. Potter, 627 P.2d 75, 78 (Utah 1981). The framing of instructions lies within the trial court's discretion. State v. Standiford, 769 P.2d 254, 266 (Utah 1988).

6. Did the trial court abuse its discretion by the manner in which it allowed the jury to conduct its deliberation? The length of time for jury deliberations is discretionary with the trial court. State v. Lactod, 761 P.2d 23, 31 (Utah Ct. App. 1988).

7. Did the trial court correctly refuse to allow the jury to view the crime scene? The decision to allow jurors to view a crime scene lies in the sound discretion of the trial court. State v. Roedl, 107 Utah 538, 155 P.2d 741, 746 (1945).

8. Does the doctrine of cumulative error apply in this case? The cumulative error doctrine does not apply when no substantial errors were committed in the trial. State v. Rammel, 721 P.2d 498, 501-502 (Utah 1986).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies is included in the body of this brief.

STATEMENT OF THE CASE

On October 27, 1989, defendant and three co-defendants were charged with second degree murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (Supp. 1990) (Record [hereafter R.] at 2 and 6). On November 1, 1989, defendant filed a motion in the circuit court for appointment of a private investigator to assist in preparation of his defense (R. at 14-16). The circuit court denied that motion on November 3, 1989, on the basis that defendant had not complied with the procedure for appointment mandated in Washington County v. Day, 447 P.2d 189 (Utah 1968) (R. at 24).

Counsel was appointed for defendant; defense counsel filed a motion for discovery on November 10, 1989[1] (R. at 34-36). Preliminary hearing for the four defendants was held December 19, 20, 21, and 22, 1989 (R. at 73 and 78-133). The charge against defendant was bound over to the trial court, which set a scheduling conference on January 3, 1990 (R. at 135 and 137).

On January 10, 1990, defendant waived his right to a speedy trial, and trial was set for February 5, 6, 7, 8, and 9, 1990. All motions were to be filed by January 12, and a transcript of the preliminary hearing was to be provided to counsel as soon as possible (R. at 141). Also on January 10, counsel for this defendant filed a motion to continue the trial, claiming that discovery had not been completed and that the private investigator (which evidently had been provided by that time) and counsel needed more time to investigate and prepare for trial (R. at 146-48). The motion was denied on the grounds, inter alia, that there had been an extensive preliminary hearing, that defendants were in custody, and that the witnesses were transient and their continued presence to testify might be jeopardized by a continuance (R. at 156-57). On January 16, 1990, defendant filed an objection to the trial setting (R. at 183).

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[1] The motion appears to have been signed on October 10; however, the crime did not occur until October 25. The order granting the motion was signed by the court on November 13. Apparently, the typewritten month on counsel's signature line is in error; the typewritten month in the certificate of mailing was corrected.

Defendant filed a motion on January 16, 1990, to allow psychological testing and evaluation regarding his ability to form the intent required for second degree murder (R. at 185). That same day, he filed a motion for appointment of a psychiatrist to determine if he "had the capacity to form the necessary intent", a toxicologist to determine the amount of marijuana present in the victim's blood, an expert to determine defendant's blood alcohol content, and a doctor to assist in interpreting the medical examiner's report (R. at 187-88). Several other documents were also filed that day, including a notice of intent to claim lack of capacity to form intent (R. at 189-200).

At hearings held on January 18, 1990, defendant argued that the jury should be transported to the crime scene to view it (Transcript of hearing 1/18/90 involving defendant and co-defendant Cabututan at 3-4). This motion was denied (R. at 236-38). On January 19, 1990, the court granted defendant's motion for expert testimony regarding defendant's level of intoxication and the effects thereof, even though the court noted that it was filed untimely (R. at 239-40).

The matter came on for jury trial on February 5, 6, 7, 8, and 9, 1990, in the First Judicial District Court, in and for Box Elder County, State of Utah, with the Honorable F. L. Gunnell, district judge, presiding (R. at 294-98). At the conclusion of trial, the jury found defendant guilty as charged (R. at 298 and 368-69). On February 20, 1990, the court

sentenced defendant to a term of five years to life in the Utah State Prison (R. at 293 and 370-72).

After trial, counsel filed a notice of appeal, and defendant sent a pro se request to the trial court asking that substitute counsel be appointed to pursue his appeal (R. at 375 and 394). On August 10, 1990, the court appointed substitute appellate counsel for defendant (R. at 407).

STATEMENT OF THE FACTS

In October of 1989, the Western Brine Shrimp Company had established a camp for its workers on the west side of the Great Salt Lake, in the Hogups area at Fingerpoint (Transcript of trial [hereafter Tr.] at 454 and 112). There were three small living trailers at the camp which were numbered from one to three (north to south) for purposes of trial (Tr. at 74). Richard Anderson, Eric Tilley, and Sherman Galardo lived in trailer #1 (Tr. at 112). Eddie Apodaca, Ray Cabututan, and Michael or Miguel Ramirez stayed in trailer #2 (R. at 86-87). Defendant stayed in trailer #3 with Billy Cayer and Don Brown (Tr. at 87 and 455).

On October 25, 1989, Eddie Apodaca and Richard Anderson spent the day building an outhouse north of the camp (Tr. at 85). Apodaca had worked at the camp for a couple of months prior to that day; Anderson had worked there four or five weeks (Tr. at 85 and 111). Defendant and Cayer had worked at the camp for approximately two months (Tr. at 455). Ramirez had worked there for two days (Tr. at 457). On October 25, Don Brown spoke with defendant about purchasing alcohol or drugs while Brown was in

Salt Lake City, delivering shrimp eggs (Tr. at 457). Defendant asked Brown to bring him a half gallon of Jack Daniels whiskey (Tr. at 458).

When Brown returned to the camp at approximately 7:30 p.m., he brought a 12-pack of beer with six beers missing, a half gallon of vodka, and a half gallon of whiskey (Tr. at 459-60). Even though there was a rule against alcohol in the camp, defendant and some of the others began drinking (Tr. at 460-69). At approximately 9:00 p.m., Betty Bentzley, one of the owners of the brine shrimp company, radioed the camp to check on the workers. Defendant answered the radio and spoke with Ms. Bentzley, assuring her that everything was fine at the camp, that all the men were in the trailers, and that no one was drinking (Tr. at 442). Ms. Bentzley only asked whether anyone was drinking as a joke; nothing about defendant's voice made her suspicious that he was drinking (Tr. at 443).

It was dark at 9:45 p.m. when defendant approached the second trailer and asked Apodaca to go with him back to trailer #3 (Tr. at 87-88). Defendant had heard that Apodaca had marijuana and defendant wanted to offer Apodaca alcohol in exchange for marijuana (Tr. at 466). The victim, Mike Ramirez, who was in trailer #2 when defendant approached Apodaca, asked Apodaca if he wanted to borrow Ramirez's knife. Apodaca thought he would not need it and walked over to trailer #3. Defendant, Brown, Cayer, and Cabututan were drinking and talking together in trailer #3 when Apodaca entered (Tr. at 89). The four men were drinking alcoholic beverages and defendant gave Apodaca a "sip"

of a mixture of kool-aid and vodka (Tr. at 90-91 and 465-67). Apodaca was accused of usurping the foreman's authority and of not helping Cabututan, and a "scuffle" ensued (Tr. at 90-91). Cabututan hit Apodaca a couple of times and knocked him back on the bed; he then hit Apodaca on the head with a sharpening stone. When Cabututan reached for a broom, Apodaca ran out the door of the trailer. As he left trailer #3, the victim, Ramirez, stepped out of trailer #2 (Tr. at 91).

Apodaca and Ramirez entered trailer #2, where Apodaca changed his clothes. He "didn't want to hang around, something might happen." Meanwhile, defendant, Brown, Cayer, and Cabututan broke into the trailer; Cabututan was carrying a pair of nunchukas (Tr. at 92-93). Ramirez stepped between the four and Apodaca, "trying to hold them back." Defendant told the others that Ramirez had a knife in his back pocket and the four of them backed Ramirez up between the beds in the trailer. At that point, Ramirez pulled out his knife and Brown also pulled a knife (Tr. at 94). Brown talked Ramirez into dropping his knife; then the three of the men grabbed Ramirez and dragged him from the trailer (Tr. at 95-96). Cayer, who was intoxicated, stayed in the trailer, hitting and kicking Apodaca. Apodaca could hear Ramirez being beaten (Tr. at 96-97).

After a few minutes, Brown returned to the trailer, told Cayer to stop hitting Apodaca, and told Apodaca to get his things and leave the camp. Apodaca gathered some belongings and left the trailer (Tr. at 96). Outside, he saw Ramirez lying on the ground and "a blur of people standing around him, kicking

him" (Tr. at 97). Apodaca started to run away between two of the trailers when defendant asked him if he was not going to stay and help his buddy. Apodaca stopped, and as he turned around, defendant hit him in the jaw, knocking him to the ground (Tr. at 97-98). From the ground, Apodaca looked under the trailer and saw Ramirez lying on the ground (Tr. at 98). When Apodaca stood up, defendant ran behind him and Cabututan came at him with a crescent wrench. Apodaca began running north (Tr. at 98). As he ran, he heard defendant tell Cabututan to let him go. Defendant said, "Let's finish this guy [Ramirez]" or words to that effect. Apodaca continued running, glancing back to see a group of people surrounding Ramirez who was still on the ground (Tr. at 99). Apodaca spent the night huddled near a bush far from the camp (Tr. at 100). In the morning, he walked to the road and was picked up by Richard Anderson and returned to the camp where the sheriff's deputies had arrived (Tr. at 100-101). He was dazed and disoriented from being struck and spending the night in the cold (Tr. at 105 and 244).

Richard Anderson was in trailer #1 with Eric Tilley and Sherman Galardo when he heard the commotion outside the trailer. He got up, put on his clothes and opened the door (Tr. at 114). Just before he looked out, he heard someone say something like, "['L]eave this cam[p] before we kill you['] and [']leave this camp with what you got on[']" (Tr. at 115). When he looked out, he saw four men standing around another on the ground (Tr. at 114-15). They were "beating on the man, kicking the man, whatever they could to hurt the man at the time." Defendant was

participating in the beating and kicking with the others (Tr. at 116).

The doors of trailers #1 and #2 were open, which let out enough light that Anderson could see what was happening. Anderson saw defendant, Cabututan, Brown, and Cayer pick up Ramirez, beat him, let him fall to the ground, and kick him. Ramirez pleaded for them to stop but they continued. After a few minutes, Cayer left but the other three continued to assault Ramirez (Tr. at 117). Anderson, Tilley, and Galardo did not go out to help Ramirez because they did not know where Cayer was and they felt in danger (Tr. at 118, 134 and 136). At one point, defendant held Ramirez up as Cabututan appeared ready to stab Ramirez. Galardo told Cabututan that he did not want to do that; Cabututan turned on Galardo. Brown raised a crescent wrench and swung it at Anderson, asking if he "wanted some of this, too"; Anderson stepped back into the trailer (Tr. at 118).

Anderson saw defendant choking and beating Ramirez in the face, saying, "['Y]ou shouldn't have cut my partner Billy. I'm going to beat you for this.[']" (Tr. at 119). At one point, someone said, "[']He's not breathing.['] And then another . . . voice said that, '[W]ell, things like that happen. He's just a spic [sic]'" (Tr. at 120). At another point, Anderson heard defendant say that he was going to kill Ramirez for "cutting [his] partner" (Tr. at 121). Defendant appeared to be doing most of the beating and appeared to be directing the others (Tr. at 151-52).

When the men stopped beating Ramirez, Ramirez got up, went to the water barrel, and went into his trailer to clean himself up. At about midnight, after things had settled down, Anderson looked out and saw defendant sitting on a vehicle as if he was watching over the camp (Tr. at 123). At about 2:30 a.m., Brown approached the trailer where Anderson and Galardo were and said, "[']You old boys didn't see anything last night, did you.[']" Anderson told him that he had not seen anything because Anderson feared for his life (Tr. at 122-23). Defendant and Brown returned to trailer #3 and sat at a table, drinking (Tr. at 124).

Tilley had left the trailer, carrying a steak knife and a sleeping bag, before Brown came to the door (Tr. at 125 and 161). He thought it was safer to leave the camp and he spent the night on a plateau behind the camp (Tr. at 161). Anderson stayed awake all night, watching the trailer door in case any of the four men returned (Tr. at 125). At about 5:00 a.m., Anderson was sitting on the edge of his bunk when he heard a rapping at the door. Outside the door was Ramirez, sitting on a pallet; he looked up and asked Anderson to call 911 (Tr. at 125). Ramirez told Anderson and Galardo that he could not breathe and that he needed water. Galardo handed him a glass of water, which he drank, then he fell over backward on the pallet. Both Anderson and Galardo checked him for pulse and respiration; when they found none, Anderson and Galardo got in a truck and drove to the nearest telephone at Lakeside. They remained at the town until the Sheriff's office called and told them that the campsite was

secure and asked them to return (Tr. at 126). Returning to the campsite, they found Apodaca about ten miles from the camp, wandering in the desert. When they got back to the trailers, Anderson saw a knife next to Ramirez's body which had not been there when they left to telephone the authorities (Tr. at 127).

An autopsy conducted on Ramirez's body showed "multiple injuries on essentially all body surfaces" (Tr. at 346). The cause of death was listed as multiple blunt force injuries (Tr. at 353). There were multiple contusions and abrasions, and bruising and scraping of the skin. There were stab and incise wounds (Tr. at 346-47). Bruising on his face and head was consistent with having been struck with a crescent wrench (Tr. at 347-52). Bruising on his neck and petechiae in both eyes was consistent with choking and asphyxiation (Tr. at 352-53).

Internal examination revealed that Ramirez's brain had swollen until it "essentially tried to push itself out of the bottom of the skull" (Tr. at 353). There was hemorrhaging at the base of the brain and in the muscles of the neck. Approximately a pint of blood was free in the chest cavity. There were multiple rib fractures, anterior and posterior and on both sides (Tr. at 354). The swelling of the brain was caused by blows to the head, choking, and an inability to inhale deeply because of the pain of the broken ribs (Tr. at 359-60).

Defendant testified that he began drinking at approximately 8:00 p.m. on October 25, 1989 (Tr. at 460 and 499). First he drank a 12-ounce can of beer, then he drank a glass of vodka (Tr. at 461). The glass was between a third and half full,

which, defendant thought, was four or five ounces of alcoholic beverage (Tr. at 463-64). He testified that he then drank four or five glasses (about one-third to one-half full) of whiskey before he went to confront Apodaca (Tr. at 465). When Apodaca entered defendant's trailer, defendant gave him defendant's drink, then pulled out a coffee cup and filled it half full with whiskey (Tr. at 467-68).

Defendant remembered the scuffle in trailer #3 between Apodaca and Cabututan (Tr. at 469). After Apodaca left, Cayer wanted to fight Cabututan, but defendant intervened. Cayer "was all drunk" and began "ranting and raving about something." Cayer "flew out the door," and Cabututan, then defendant, followed him (Tr. at 470). They found Cayer in trailer #2, trying to fight Apodaca (Tr. at 471-73). Defendant restrained Cabututan from using nunchukas and told Ramirez that he was going to remove Cayer from the trailer (Tr. at 474-75). When Brown entered the trailer, Brown told Ramirez to put his knife down. As Ramirez looked toward Brown, defendant hit Ramirez in the side of the face (Tr. at 475). Ramirez fell on a bunk, defendant jumped on him and punched him four or five more times; Ramirez had a bloody nose and lip. Ramirez struggled to get up and ran out the door (Tr. at 476).

Defendant got Cayer out of the trailer and heard scuffling sounds outside (Tr. at 477-78). Apodaca came out of the trailer and exchanged words with defendant and defendant punched him (Tr. at 480). After chasing Apodaca a short distance, defendant walked around the trailer and saw Ramirez

lying face down on the ground, moaning and half conscious (Tr. at 481-82). As defendant tried to pick him up, "someone come [sic] and kicked him in the face." After someone kicked Ramirez, defendant pushed down on him, pushing his head in the dirt and said, "[D]on't kick him" (Tr. at 483-84). Defendant walked Ramirez to his trailer and told him to lie down. Ramirez sat on the bed and defendant returned to his own trailer and had another drink (Tr. at 484). Defendant does not remember anything more until he awoke the next morning (Tr. at 485). He explained that the blood found on the clothing he had been wearing might have gotten there when he punched Ramirez in trailer #2 or when he helped Ramirez up after he had been beaten (Tr. at 486).

SUMMARY OF ARGUMENT

Defendant did not preserve his claims of prosecutorial misconduct in closing argument because he did not interpose an objection to the comments at the time they were made. Alternatively, although defendant alludes to plain error, he has failed to fully analyze this claim under that doctrine. Even if the proper analysis had been made, defendant has not shown that the prosecutor's comments were error or that there was a reasonable likelihood of a different result had the statements been objected to and stricken. By his own testimony, defendant claims that he did not participate in the beating of the victim. The eyewitness testimony was to the contrary. These two distinct evidentiary options for the jury to accept decreases the possibility that the jury would have been influenced by the prosecutor's remarks.

The record demonstrates that defendant was provided with the services of an investigator long before the trial court actually signed an order appointing the investigator. Not only did defendant have the services of an investigator, he also has not demonstrated how an earlier appointment could have provided any more assistance to the preparation of his case.

Defendant's request for appointment of a psychiatrist was not made in a timely fashion and the trial court properly denied the motion.

Defendant has not demonstrated that he was prejudiced by the court's denial of his motion for continuance. Counsel had been on the case since defendant was first charged and had had two and a half months before filing his motion to prepare for this case. He had another twenty-five days after the motion to continue was denied to continue to prepare. Defendant has not shown that the matters he needed to review and complete could not have been accomplished in the time given.

Counsel did not provide ineffective assistance by filing an untimely motion for appointment of a psychiatrist because a psychiatrist could not assist in the defense that defendant raised by his own testimony. Neither could a psychiatrist assist given the paucity of evidence of defendant's supposed intoxication. There is no evidence that counsel did not adequately prepare for trial or that his cross-examination was deficient. Defendant has also failed to show how a failure to call character witnesses prejudiced his defense. Finally, defendant has not alleged how counsel's failure to object to

prosecutorial statements in the closing argument prejudiced him; consequently, he has not demonstrated ineffective assistance by his trial counsel.

The trial court responded to the questions submitted by the jury during their deliberation in an appropriate fashion when the court referred the jury to other instructions which would answer the questions they posed.

Allowing the jury to deliberate until 1:20 a.m. was not coercive and did not deprive defendant of a fair trial or of due process. The jury did not ask to retire from deliberation and showed by the questions they sent out that they were giving due consideration to the instructions and the evidence. When the jury was polled after the verdict, each juror affirmed that the verdict was his or hers individually. Defendant has not shown that he was deprived of the "considered judgment of each juror."

The jury had the benefit of diagrams and photographs of the crime scene; consequently, the trial court did not abuse its discretion in denying a motion to allow the jury to visit the scene.

Because no substantial errors were made at trial, the doctrine of cumulative error does not apply.

ARGUMENT

POINT I

DEFENDANT DID NOT PRESERVE HIS CLAIMS OF PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT. WHETHER PRESERVED OR NOT, THE STATEMENTS BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

Defendant alleges that the prosecutor committed prejudicial error in closing argument. None of the nine specific instances which defendant cites as error have been preserved for appellate review.

> "A general rule of appellate review in criminal cases in Utah is that a contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record before an appellate court will review such claim on appeal."

State v. Johnson, 774 P.2d 1141, 1144 (Utah 1989) (emphasis in original) (quoting State v. Tillman, 750 P.2d 546, 551 (Utah 1987)). After closing arguments were completed, the jury retired to deliberate (Tr. at 669). It was not until after this point that defendant moved for a mistrial on the two bases that the prosecutor had implied that defendant and Cabututan had conspired to fabricate their testimonies, and that the prosecutor had called defendant a criminal (Tr. at 669-71).[2] In State v. White, 577 P.2d 552 (Utah 1978), the Utah Supreme Court held that a motion for mistrial after the jury had retired to deliberate did not preserve White's claims for review. The court said:

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[2] Contrary to defendant's statement in his brief (Brief of Appellant [hereafter Br. of App.] at 33), the court did not deny the motion for mistrial and give his reasons therefor in front of the jury. The jury had retired when defendant made his motion and the judge denied it (Tr. at 669-71).

> Defense counsel made no objection at that time [during the prosecutor's rebuttal], but after the jury had retired to deliberate, included that as a ground for a motion for a mistrial. . . . If counsel desires to object and preserve his record as to such an error during argument, he must call it to the attention of the trial court so that if he thinks that it is necessary and appropriate to do so, he will have an opportunity to rectify any error or impropriety therein and thus obviate the necessity of an entire new trial.

Id. at 555 (footnote omitted). Of the nine claims of prosecutorial misconduct stated by defendant, seven were never raised in the trial court, and two were only raised in the motion for mistrial after the jury had retired. For the reason of failure to object alone, this Court should decline to review defendant's claim.

In some, but not all, of the specific claims of misconduct, defendant alludes to plain error; however, he provides little specific legal and factual analysis of the plain error doctrine in the specific allegations. Rule 24(a)(9), Utah Rules of Appellate Procedure (1990) requires that "the argument section of a brief 'contain the contentions of the [party] with respect to the issues presented and the reasons therefor, with citations.' . . . A brief must contain some support for each contention." State v. Wareham, 772 P.2d 960, 966 (Utah 1989) (emphasis in original). See also State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984).

The Utah Supreme Court has recognized that "[c]ounsel for both sides have 'considerably more freedom in closing argument' and 'a right to discuss fully from their standpoints

the evidence and the inferences and deductions arising therefrom.'" State v. Parsons, 781 P.2d 1275, 1284 (Utah 1989) (quoting State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988) (quoting State v. Valdez, 30 Utah 2d 54, 60, 513 P.2d 422, 426 (1973)). In reviewing a claim of prosecutorial misconduct, the Court "must determine if the prosecutor's remarks calls [sic] to the attention of the jurors matters they would not be justified in considering in reaching the verdict and, if so whether there is a reasonable likelihood that the misconduct so prejudiced the jury that there would have been a more favorable result absent the misconduct.'" State v. Speer, 750 P.2d 186, 190 (Utah 1988) (citations omitted). Analysis of the alleged errors in closing argument will be conducted under the standards enunciated in cases of alleged prosecutorial misconduct and under the plain error standard.

A. Analysis under the first prongs of the prosecutorial misconduct test and the plain error doctrine.

In his introduction to point I, defendant cites generally to the two-pronged plain error test. As enunciated in State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, 110 S.Ct. 62 (1989), that test is 1) whether the error should have been obvious to the trial court; and 2) whether the error was harmful, i.e., whether there is a reasonable likelihood of a more favorable result had the error been corrected. The second prong is the same as the second prong of the test for prosecutorial misconduct stated above.

As noted above, defendant moved for a mistrial after closing argument based on two statements allegedly made by the prosecutor in argument. The trial court denied the motion, stating that both statements were

> logically extensions of . . . the facts of this case. If he murdered a man, he's a criminal. I think the allegation is that he committed a murder, and I interpret the argument as being that for them to find that he is a criminal. As far as them getting together, they were together the whole night after the incident, had an opportunity to talk about the case. I don't know that there is any evidence that they did so, but certainly that's a reasonable inference for what they were doing with their time during that period of time and in the morning as well before the law enforcement people got there. So I just find that to be a logical -- or an argument made from some facts that were before the court, so I will deny that motion.

(Tr. at 671). Defendant analyzed the claim that the prosecutor "stigmatized" defendant by calling him a criminal under the plain error test. However, he does not cite to the record for the alleged error, other than to defense counsel's statement in the motion for mistrial. Koulis v. Standard Oil Co. of Cal., 746 P.2d 1182, 1184-85 (Utah Ct. App. 1987) (quoting Uckerman v. Lincoln Nat'l Life Ins. Co., 588 P.2d 142, 144 (Utah 1978)) ("This Court need not, and will not, consider any facts not properly cited to, or supported by the record"). This Court should decline to consider this claim because of defendant's failure to cite to the record, as well as his failure to object.

Defendant next claims error because the prosecutor implied that defendant and Cabututan had "[c]onspired [t]o [f]abricate" their testimony (Br. of App. at 35). Defendant

argues that when the remarks regarding this issue were made "the trial court should have, at a minimum, immediately sustained an objection" (Br. of App. at 36). However, defense counsel did not interpose an objection; consequently, the court could not sustain one (Tr. at 628-35). Defendant does not analyze this claim as plain error and this Court should decline to review it.

Defendant alleges that the prosecutor expressed his opinion that defendant was not telling the truth, and that the error in that argument should have been obvious to the trial court. Defendant does not analyze the second prong of the plain error test. While it may be improper for a prosecutor to express his personal belief or opinion of the truthfulness of testimony, LaFave, Criminal Procedure, § 23.5(b) at 34 (1984), defendant must demonstrate a reasonable likelihood of a different result had the statements not been made. This prong of the test will be addressed further in subpoint B.

The next claim is that the prosecutor erred in informing the jury that Cabututan had been convicted of second degree murder in his own trial. Cabututan did not testify at defendant's trial; as an unavailable witness, his testimony from the preliminary hearing was read into the record (Tr. at 575-613). As with any other witness, Cabututan could be and was impeached by his felony conviction. Rule 609(a), Utah Rules of Evidence. In closing, the prosecutor referred to Cabututan's conviction, not "as proof of Appellant's guilt" (Br. of App. at 39), but in terms of Cabututan's credibility and motive to be untruthful (Tr. at 634-35). This was proper comment on

Cabututan's impeachment by his felony conviction; it was not error.

Defendant next complains that the prosecutor erroneously compared the evidence in defendant's case with other cases. His only legal analysis is a reference to "the Miranda court" with no citation to that case. Without telling this Court what specific Miranda case he is referring to, defendant equates the prosecutor's comments in the present case with "similar comments . . . alluding to the fact that the co-defendant had been convicted on much weaker evidence than the evidence introduced against defendant" (Br. of App. at 41). Whatever case defendant is referring to, it clearly is not on point with the present case. The case referred to involved statements about a co-defendant being convicted on weaker evidence. The prosecutor's comment in the present case did not compare this case with the trials of the co-defendants; the comment merely stated that the evidence in this case included eyewitnesses, physical evidence, and expert testimony (Tr. at 668).

Contrary to defendant's assertion, the prosecutor did not misstate the evidence about defendant's intoxication. The prosecutor correctly stated that the testimony of Apodaca, Anderson, Tilley, and Ms. Bentzley did not include that defendant was "staggering" or exhibited "slurred speech" (Tr. at 667). As defendant notes, Apodaca, in response to defense counsel's question whether defendant was "quite drunk" when he approached Apodaca, said that defendant did not "seem quite drunk" to the witness (Tr. at 103). In the context of Anderson's perception of

the dangerousness of defendant and the other assailants, defense counsel asked if he felt they were dangerous because they were drunk. Anderson responded that he "guess[ed] so" (Tr. at 136). When counsel asked if all four were "pretty drunk," Anderson answered, "My opinion, yes" (Tr. at 140). Tilley thought the defendants "had been drinking" (Tr. at 160). Later, defense counsel asked Tilley if the defendants were "quite drunk," and Tilley responded that he assumed that they had been drinking because they had drunk on the job before (Tr. at 173). Ms. Bentzley testified that defendant spoke "very clear[ly]" when she spoke on the radio with him at 9:00 p.m. (Tr. at 442-43). Just as the prosecutor stated, these witnesses had not testified that they had noticed "any staggering, slurred speech, anything like that" (Tr. at 667). The inference from the three on-site witnesses's testimony was that they thought that defendant had been drinking or may have been drunk but there was no testimony that defendant was not moving in a normal fashion. The prosecutor's statements were not a misstatement of the testimony.

The statement that the defendant would prefer being convicted of something less than second degree murder came in the context of suggesting that the jury look at the murder jury instruction before contemplating the lesser offense instructions (Tr. at 661-62). Defendant cites a Pennsylvania case as analogous to this comment but does not demonstrate how this case makes the prosecutor's statement obvious error (Br. of App. at 43). The jurors's common sense would tell them that a person would prefer to be convicted, if at all, on a lesser charge. The

prosecutor was merely stating the obvious, he was not disparaging a legitimate defense strategy.

Defendant next cites two comments by the prosecutor which he states "were specifically calculated to cause jury prejudice and as a result, it is argued, they too constituted error" (Br. of App. at 43). No analysis of the impropriety of these remarks is presented and this Court should decline to address those comments. Amicone, 689 P.2d at 1344.

Defendant maintains that the prosecutor vouched for the credibility of Anderson. A reading of the transcript cites provided in this point shows that the prosecutor's comments were in reference to consistency between the testimony of Anderson and the other evidence. Many of the citations do not have any reference to Anderson's testimony. Defendant has not shown that the prosecutor vouched for the credibility of Anderson.

B. There is no reasonable likelihood of a different result had the prosecutor's statements been objected to and disregarded.

Under either the plain error test or the prosecutorial misconduct test, defendant must show prejudice. Even if all of the statements defendant complains of were improper, there simply is no reasonable likelihood that the improper remarks so prejudiced the jury that there would have been a more favorable result for defendant in their absence. There was substantial testimonial and physical evidence of defendant's guilt. See State v. Troy, 688 P.2d 483, 486 (Utah 1984) ("'If proof of defendant's guilt is strong, the challenged conduct or remark will not be presumed prejudicial'").

The eyewitness testimony was that defendant joined in kicking and beating Ramirez outside the trailer; in fact, defendant seemed to be directing the beating (Tr. at 116-21 and 151-52). Defendant was heard threatening to beat and to kill Ramirez (Tr. at 119-21). Defendant testified that he struck the victim five or six times while they were in trailer #2 (Tr. at 475-76). He claimed that he was chasing Apodaca and heard only "scuffling" when Ramirez was being beaten outside of the trailer (Tr. at 477-81). When next he saw Ramirez, Ramirez was on the ground, half conscious, and defendant tried to help him up (Tr. at 482-83). Someone else kicked Ramirez and defendant told them not to (Tr. at 483). Defendant did push down on Ramirez as he told the kicker to leave Ramirez alone, but then defendant helped Ramirez up and walked him to his trailer (Tr. at 483-84). In State v. Smith, 700 P.2d 1106 (Utah 1985), the Supreme Court faced a similar situation and said:

> As we have pointed out earlier, this record contains substantial evidence of defendant's guilt. His primary theory at trial appears to have been that someone else committed the crime . . .. The jury was free to accept or reject that theory in its entirety. Because the two options were so distinct, this is not a case where the evidence presented a close question or offered several possible constructions of ambiguous evidence. The possibility that the jury would be influenced by the prosecutor's reference to irrelevant factors in his closing statement was therefore greatly diminished.

Id. at 1112. The jury was given two distinct options about defendant's involvement in Ramirez's death. As in Smith, the evidence was not ambiguous and the jury was not likely to have

been overly influenced by the prosecutor's closing statement.

Defendant's final claim is that if none of the errors he alleges were reversible errors, their cumulative impact constituted reversible error. A similar argument was rejected in State v. Rammel, 721 P.2d 498, 501-502 (Utah 1986), when the supreme court held that the cumulative error doctrine does not apply when no substantial errors were committed. As argued above, the errors claimed by defendant either were not errors at all or were not prejudicial; consequently, taken together they do not constitute cumulative reversible error.

POINT II

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY THE TIMING OF ITS APPOINTMENT OF AN INVESTIGATOR OR BY DENYING DEFENDANT'S REQUEST FOR APPOINTMENT OF A PSYCHIATRIST TO ASSIST IN HIS DEFENSE.

Defendant alleges that he was denied effective assistance of counsel, a fair trial, due process, or equal protection by the court (Br. of App. at 47). He addresses a claim of ineffective assistance of counsel as a separate point; that issue will also be addressed separately by the State.

Defendant claims a general violation of his right to fair trial, due process, and equal protection under both the federal and state constitutions. He has not analyzed the claim separately under the state constitution; consequently, this Court should not review the claim as a separate state constitutional issue. See State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988). Defendant has divided this issue into two subpoints; the first is that the trial court "belatedly" appointed an

first is that the trial court "belatedly" appointed an investigator for defendant.

A. Appointment of an investigator.

The second is that the trial court erred in not appointing a psychiatrist to assist in his defense. Defendant asserts that "belated" appointment of an investigator was a violation of his right to a fair trial and due process (Br. of App. at 49-50). The legislature has determined that

> [t]he following are minimum standards to be provided by each county, city and town for the defense of indigent persons in criminal cases in the courts and various administrative bodies of the state:
>
> . . .
>
> (3) Provide the investigatory and other facilities necessary for a complete defense.

Utah Code Ann. § 77-32-1 (1990). The Utah Supreme Court explained the identical predecessor of this statute in Washington County v. Day, 22 Utah 2d 6, 447 P.2d 189 (1968). In that case, the court said:

> When counsel has once been appointed, he can petition the county to appoint an investigator; and in case of a refusal to act, counsel can then bring a writ of mandamus in court, and the court can after hearing the matter determine if an investigator should be appointed and can order the commissioners of the county to make an appointment.
>
> . . .
>
> [However,] the law requiring an investigator as one of the minimum requirements does not contemplate an investigator unless there is some reasonable basis to justify an investigator spending time and incurring expenses.

(1972), the supreme court held that a denial of Cote's application for appointment of an investigator was not prejudicial to his rights. There was no showing that the information Cote thought an investigator would find would have aided in his defense.

As indicated by the statutory provision for investigatory assistance and by the Day case, an investigator is not automatically appointed. Defendant must show a "particularized need" for an investigator. LaFave, Criminal Procedure, § 11.2(d) at 5 (Supp. 1990). "Establishing sufficient need for a special investigator appears to be especially difficult, perhaps because it is assumed that investigation of the facts is ordinarily within the expertise of counsel." LaFave, Criminal Procedure, § 11.2(d) at 26 (1984) (footnotes omitted).

The record demonstrates that defendant made an oral motion on October 31, 1989, and filed a written motion for appointment of investigator in the circuit court on November 2, 1989 (R. at 10 and 14-16). The county attorney filed a response, citing the Day and Cote cases, and alleging that defendant had failed to follow the procedure outlined in Day in requesting the appointment (R. at 19-23). In a decision signed November 3, 1989, the circuit judge determined that defendant had not complied with Day, and declined to appoint an investigator (R. at 24). The next record mention of an investigator is on November 20, 1989, with a clerk notation, "Trying for Private Investigator" (R. at 66). Defendant's preliminary hearing was

held December 19-22, 1989 (R. at 7 and 78-124). Nothing was noted in the record of the preliminary hearing about appointment of an investigator.

Defendant was arraigned in the district court on January 2, 1990; again no mention of an investigator appears in the record (R. at 137). At a scheduling conference on January 10, 1990, defendant was given until January 12, 1990, to file all motions (R. at 141). Also on January 10, defendant filed a motion for continuance; in the body of that motion, defendant refers to "the private investigator appointed in this matter" (R. at 147). In a response filed January 10 to the motion to continue, the deputy county attorney indicated that "investigators were appointed weeks ago" (R. at 152). Finally, on January 17, 1990, the court signed a written order appointing an investigator in this case; the court appointed the same investigator which had been appointed "in a related case" (R. at 197).

At a hearing on motions, held January 18, 1990, the deputy county attorney referred to a hearing held "several weeks before the arraignment . . . which was sort of an appeal from the circuit court, . . . where the defendants . . . said we need an investigator because we have witnesses we want to interview" (Transcript of Cabututan hearing 1/18/90 at 40[3]).

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[3] Two hearings were held on January 18, 1990, one involving Cabututan and his counsel, Quinn Hunsaker. The second hearing involved defendant and his counsel, Jack Molgard. Mr. Molgard incorporated the arguments of Mr. Hunsaker and the court issued the same rulings in defendant's proceeding as had been issued in Cabututan's proceeding (Transcript of Cummins hearing 1/18/90 at 10-24).

While the record does show the initial request for an investigator occurring on November 3, 1989, and the written appointment being signed January 17, 1990, the actual length of time between the request and the appointment of an investigator apparently was shorter than that. If, as directed by the circuit court ruling on November 3, 1989, defendant approached the county for an investigator, the provision of that investigator may not appear in the record. From defendant's motion to continue, the State's response and the statements in the January 18 hearing, it appears that an investigator was provided to all four defendants well before the district court signed the order for an investigator provided by Mr. Molgard.

Even if the court had been remiss in timely appointing an investigator, defendant has not shown prejudice by the fashion in which the investigator was provided. See State v. Cote, 27 Utah 2d 24, 492 P.2d 986, 987 (1972). Defendant alleges that there were discrepancies between the versions of the incident given by the eyewitnesses and defendant. Consequently, he maintains, "it was necessary to the preparation of an adequate defense that a private investigator be appointed to assist in interviewing the witnesses; to point out inconsistences to the witnesses, and attempt to decipher the truth prior to the preliminary hearing" (Br. of App. at 52). It is difficult to see how an investigator was "necessary" to point out inconsistencies between statements to the witnesses. Defense counsel was given the statements and was able to discern the inconsistencies. What would have been accomplished by pointing out the alleged

inconsistencies to the witnesses? How would an investigator have been any more capable of "decipher[ing] the truth prior to the preliminary hearing" than counsel? By pointing out the inconsistencies between the statements, would an investigator have been able to convince any of the witnesses to change their versions of the event? If he had, counsel would then have been free to impeach the witnesses with the change in their own statements in addition to using the inconsistencies between the statements of the different witnesses at trial. An investigator could have done no more than defense counsel could in finding the inconsistencies before trial; only counsel was in a position to use those inconsistencies at trial.

Defendant argues that he should have been allowed to question the witnesses before preliminary hearing because after the testimony is given at that proceeding, it is "cast in stone" (Br. of App. at 52). He does not allege that he was denied access to the witnesses; nor does he indicate why the statements given by the witnesses before preliminary did not serve the same function of setting their versions in stone.

Defendant next contends that an investigator could have taken photographs of the crime scene prior to the preliminary hearing to be shown to the witnesses to help them remember what they had seen (Br. of App. at 53). The exhibit list of the preliminary hearing demonstrates that photos of the scene were introduced into evidence and evidently were available for the purpose defendant cited for their use (R. at 125-33). Defendant

does not indicate why these photographs were not sufficient for his purposes.

Defendant also says he was restricted because his investigator did not obtain information regarding the victim's background and any violent nature of the victim or witnesses. He claims that this was necessary because defendant contends he was acting in self-defense; however, at trial, defendant never claimed that he acted in self-defense. Defendant testified that he hit Ramirez in the trailer when Ramirez's attention was drawn to Brown (Tr. at 475). Defendant said that he only heard scuffling when Ramirez was being beaten; defendant merely helped Ramirez up after the beating and helped him to his trailer (Tr. at 476-78 and 482-84). This defendant has never claimed that he struck Ramirez in self-defense; consequently, he did not need an investigator to bolster that defense.

B. Appointment of a psychiatrist.

Defendant maintains that he should have been allowed the assistance of a psychiatrist to determine whether he had the requisite mental state to be convicted of second degree murder. In point II, defendant argues this subpoint as a denial of due process and as a denial of the effective assistance of counsel. The assistance of counsel claim is raised again in point IV; the State will address that issue in the subsequent point.

On January 16, 1990, defendant filed a motion to allow psychological testing and mental evaluation (R. at 185); a motion for appointment of court appointed experts, including a psychiatrist to determine defendant's capacity to form the

"necessary intent", a toxicologist to determine amount of marijuana in the victim's blood, an expert to determine the level of alcohol in defendant's blood, and a medical doctor to assist in evaluating the medical examiner's report (R. at 187-88); a notice of intent to claim lack of capacity to form intent (R. at 189); and a motion to appoint psychiatrist and expert personnel to evaluate the effects of voluntary intoxication and alcoholism on the defendant's ability to "form the specific intent to commit" the crime (R. at 194). After written response from the State and argument on the matter in the Cabututan and Cummins hearings on January 18, the court denied the motions except for testimony relating to the level of intoxication and the effects thereof on defendant (R. at 235 and 239-40). The court determined that the motions were untimely but that there was good cause for allowing testimony of the level of intoxication (R. at 239).

Analysis of this issue involves an interplay of several statutes. Utah Code Ann. § 76-2-306 (1990) reads:

> Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense[.]

Utah Code Ann. § 77-14-3 (1990) states:

> (1) When a defendant proposes to offer . . . testimony of a mental health expert to establish mental state, he shall, at the time of arraignment or as soon afterward as practicable, but not fewer than 30 days before the trial, file and serve the prosecuting attorney with written notice of his intention to claim the defense.

Defendant filed a notice of intent to claim lack of capacity to form the requisite mental state on January 16, 1990 (R. at 189). This was fourteen days after arraignment (R. at 137), and twenty days before trial began (R. at 295). The trial court determined that this notice was untimely under Utah Code Ann. § 77-14-3. This factual determination is fully supported by the record in this matter and should not be disturbed. See State v. Walker, 743 P.2d 191, 193 (1987).

Defendant argues that he should not "now be asked by the Court to pay the heavy price of waiver" because of his counsel's alleged lack of knowledge of the time requirements of the statute (Br. of App. at 57). This aspect of the issue and a harmless error analysis will be addressed in the subsequent argument concerning the effective assistance of counsel.

POINT III

THE COURT PROPERLY DENIED DEFENDANT'S MOTION FOR CONTINUANCE.

Regarding a motion to continue trial, the Utah Supreme Court has said:

> It is well established in Utah, as elsewhere, that the granting of a continuance is at the discretion of the trial judge, whose decision will not be reversed by this Court absent a clear abuse of that discretion. State v. Moosman, Utah, 542 P.2d 1093 (1975). Abuse may be found where a party has made timely objections, given necessary notice and made a reasonable effort to have the trial date reset for good cause. Griffiths v. Hammon, Utah, 560 P.2d 1375 (1977).

State v. Creviston, 646 P.2d 750, 752 (Utah 1982). "A serious lack of preparation might, in some circumstances, have such a

disadvantageous effect on a defendant's representation as to rise to a constitutional violation." State v. Pursifell, 746 P.2d 270, 274 (Utah Ct. App. 1987). While a denial of a motion to continue trial to allow more time for preparation may rise to the level of a violation of the constitutional right to the effective assistance of counsel, Heffernan v. Lockhart, 834 F.2d 1431, 1437 (8th Cir. 1987), denial of the motion is not a per se violation. In a concurring opinion in State v. Gonzales, 641 P.2d 146 (Utah 1982), Justice Howe said:

> denial of defendant's motion for a continuance did not prohibit him from having effective assistance of counsel. The granting of a continuance is within the sound discretion of the trial court. State v. Moosman, Utah, 542 P.2d 1093 (1975). . . . Defense counsel prepared five motions within a week of his appointment. He filed a motion for a bill of particulars on the same day he entered an appearance, nine days before trial.

Id. at 147-48 (Howe, J., concurring). Although Gonzales's counsel entered an appearance only nine days before trial, the supreme court determined that the record did not demonstrate that counsel was ineffective or unprepared. Id.

Defendant's counsel filed a motion to continue his trial on January 10, 1990 (R. at 146-48), eight days after defendant was arraigned (R. at 137), and twenty-five days before trial (R. at 295). Counsel had been appointed on the day charges were filed, October 27, 1989 (R. at 8), and continued as counsel through trial (R. at 298). In the motion to continue, counsel complained that there was insufficient time to review all of the evidence, review the preliminary hearing transcript, interview

remaining witnesses, allow the investigator to "insure that weather conditions are appropriately similar to the conditions existing at the time of the claimed incident," analyze non-specified fingerprint evidence, and consult with an unnamed psychiatric expert (R. at 146-48). The State filed a response on January 10, claiming that much of the evidence which counsel said he needed to review had been available to counsel since defendant's arrest in October 1989. The trials had been set in a speedy fashion in order to protect the evidence which would come from eyewitnesses who were transient in the area. The tape recording of the preliminary hearing had been available to counsel since the time of the hearing and the transcript was being provided to counsel on January 10 or 11. Witnesses had been available since October for interviewing by counsel or his investigator. Waiting for similar weather conditions for investigation was a "truly novel" idea. No indication of the nature or importance of fingerprint evidence was given. Finally, counsel had known of the involvement of alcohol since the beginning of the case; ample time existed for counsel to have consulted, or still to consult, with a psychiatric expert (R. at 149-53).

The court denied the motion on January 11, finding that counsel had had full access to the county attorney's files, there had been an extensive preliminary hearing at which counsel had been able to cross-examine all of the witnesses at length, the transient nature of the witnesses dictated a speedy trial setting, and defendant was in custody (R. at 156-57). This

denial was not an abuse of discretion. Counsel had had from October 27, 1989, to January 11, 1990, to conduct the review and investigation that he thought crucial. He also had the remaining twenty-five days until trial to continue to prepare. All of the preparations included in defendant's motion to continue, or in his brief on appeal, could have been accomplished in the time between the charging of the crime and the trial. The trial court no doubt was aware of this when it denied the motion; that denial was not an abuse of discretion.

POINT IV

TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE TO DEFENDANT.

Defendant contends that his trial counsel provided ineffective assistance on four bases: 1) Counsel failed to file a timely motion for psychiatric assistance; 2) counsel failed to adequately prepare; 3) counsel failed to call character witnesses; and 4) counsel failed to object to prosecutorial errors.

This Court addressed the issue of effective assistance of counsel in State v. Pursifell, 746 P.2d 270 (Utah Ct. App. 1987), in which it said:

> In Strickland v. Washington, 466 U.S. 668 . . . (1984), the United States Supreme Court established the standard for determining claims of ineffective assistance of counsel at trial. To prevail, the defendant must demonstrate, first, that counsel's representation fell below an objective standard of reasonable professional judgment, and second, that counsel's performance prejudiced the defendant. Id. at 690 . . . . The Utah Supreme Court has adopted and interpreted the Strickland standard for determining ineffective assistance claims.

> See, e.g., State v. Frame, 723 P.2d 401 (Utah 1986).

746 P.2d at 275 (parallel citations omitted). Interpreting the test from Strickland v. Washington, 466 U.S. 668 (1984), the Utah Supreme Court said:

> Defendant must prove that specific, identified acts or omissions fall outside the wide range of professionally competent assistance.
>
> . . .
>
> Furthermore, any deficiency must be prejudicial to defendant. . . . To be found sufficiently prejudicial, defendant must affirmatively show that a "reasonable probability" exists that, but for counsel's error, the result would have been different. We have defined "reasonable probability" as that sufficient to undermine confidence in the reliability of the verdict.

State v. Frame, 723 P.2d 401, 405 (Utah 1986) (footnote omitted). This Court "'need not determine whether counsel's performance was deficient before examining the prejudice suffered by defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" Id. (quoting Strickland, 446 U.S. at 697). Applying this test to the present case, defendant has not demonstrated that he was prejudiced by his counsel's performance.

A. Motion for appointment of a psychiatrist.

Defendant first claims that his counsel was deficient because he failed to file a timely motion for psychiatric assistance. The record demonstrates that there was no reasonable

probability of a different result at trial had counsel filed a timely motion and a psychiatrist been appointed. While there was testimony of the amount defendant had allegedly had to drink, the defense, based on his own testimony, was that he had not participated in the beating, not that he had not had the requisite mental state to commit the crime. Defendant testified to punching Ramirez five or six times while they were in the trailer (Tr. at 475-76). When Ramirez was being beaten outside the trailer, defendant claims to have been inside trying to get Cayer out of the trailer and then to have been chasing Apodaca (Tr. at 477-81). His next contact with Ramirez was when he tried to help him up, keep others from kicking Ramirez, and then helping Ramirez to his trailer (Tr. at 483-84). From his own testimony, his defense was that he did not participate in the severe beating which lead to Ramirez's death. In State v. Padilla, 776 P.2d 1329 (Utah 1989), the Utah Supreme Court applied harmless error analysis to Padilla's claim that the trial court's voluntary intoxication instruction was faulty. Id. at 1331-32. The court found that Padilla had not relied on an intoxication defense as the theory of his case. Padilla claimed at trial that the shooting was accidental; consequently, his inability to form the requisite mental state was not at issue. In the present case, as in Padilla, defendant presented evidence that he had been drinking; however, his own testimony was that he had not participated in the beating and kicking. Defendant's defense was that he did not cause the death, not that he did not have the requisite mental state. A psychiatrist would not have

assisted defendant in presenting this defense.

While in the present case there is evidence that defendant had consumed alcohol, he does not claim that he "blacked out" or lacks memory of the attack on Ramirez. In Padilla, eyewitnesses to Padilla's crime had testified that he was not incapacitated. Padilla "himself testified in detail about the events leading up to the incident, but claimed to have lost his memory regarding the shooting itself." Id. at 1332. The court said, "This evidence all tends to negate defendant's position that he was so intoxicated that he 'blacked out' before and during the time of the shooting." Id.

In State v. Wood, 648 P.2d 71 (Utah 1982), the supreme court addressed an intoxication defense, stating that, "for Wood to have been successful, he had to prove much more than he had been drinking. It was necessary to show that his mind had been affected to such an extent that he did not have the capacity to form the requisite [mental state.]" Id. at 90. As in Padilla, neither Wood nor an eyewitness testified that Wood's "faculties were impaired" Id. Nothing in the present case points to a finding that defendant was so intoxicated that he could not have formed the requisite mental state. The eyewitnesses presumed that defendant was drunk but they did not testify that defendant had any trouble moving about or participating in the beating. Defendant shows a clear recollection of his version of what occurred, which attempts to minimize his own participation, but which does not show that defendant was not aware of what he was doing. Defendant was seen directing the beating administered to

Ramirez (Tr. at 151-52); he was also seen beating, kicking and choking Ramirez in conjunction with the other three (Tr. at 116). Several times during the beating, defendant was heard threatening to beat and to kill Ramirez (Tr. at 119 and 121). The inferences from the evidence is that defendant knowingly and intentionally struck Ramirez, intending to cause serious bodily injury, and committing acts clearly dangerous to human life, or acted with depraved indifference to Ramirez's life as he participated in the beating. Utah Code Ann. § 76-5-203 (Supp. 1990). A psychiatrist could only have testified from the information presented to him or her. From the evidence produced at trial, there was little evidence that a psychiatrist could have used to determine that defendant did not have a culpable mental state. The evidence of the amount of alcohol consumed came only from defendant himself and did not comport with the evidence of defendant's lack of impairment. The testimony of the eyewitnesses and defendant himself shows that defendant was not impaired to the point of negating the requisite mental state. Since the evidence did not support a finding that defendant had been intoxicated to the extent of negating his mental state, a psychiatrist could not have assisted in establishing that defense.

B. Adequate preparation and cross-examination.

Defendant next contends that trial counsel did not adequately prepare for trial, which inadequate preparation caused him to be deficient in cross-examining the eyewitnesses. Defendant has failed to provide an adequate record to allow this Court to address these issues.

> To affirm a reversal of his conviction, [defendant] must show prejudicial error. State v. Jones, Utah, 657 P.2d 1263, 1267 (1982). Since the record is silent as to why the motion [] was denied, "we do not presume either error or prejudice." State v. Hamilton, 18 Utah 2d 234, 239, 419 P.2d 770, 773 (1966). . . .
>
> Since [defendant] has not supplied a trial transcript on appeal, we are unable to determine whether [defendant] was [prejudiced by denial of his motion.] Since there is no record evidence showing that [defendant] was prejudiced by a lack of a bill of particulars, we must assume the regularity of the proceedings below and affirm the judgment.

State v. Robbins, 709 P.2d 771, 773 (Utah 1985). Defendant has not provided a record for his claims that trial counsel failed to interview witnesses prior to preliminary hearing, to obtain photographic evidence of the crime scene, to obtain background information of the victim, and to review the preliminary hearing transcript and statements of witnesses. Because defendant has not carried his burden of proving specific omissions, this Court should presume "that counsel rendered adequate assistance and exercised 'reasonable professional judgment.'" Frame, 723 P.2d at 405 (quoting Strickland, 466 U.S. at 690).

Defendant cites to several instances of alleged discrepancies between the eyewitnesses' trial testimony and their pretrial statements and testimony at the preliminary hearing. Defendant has not provided the preliminary hearing transcript or the pretrial statements to allow this Court to review the allegations. This Court should presume regularity and decline to address these claims. State v. Robbins, 709 P.2d 771, 773 (Utah 1985).

Even if the actions or omissions of trial counsel which defendant challenges were deficient, he has not demonstrated that he was prejudiced by counsel's performance. The discrepancies defendant lists in his brief were minor differences which usually can be explained by the differences in perception between different witnesses with different vantage points. Apodaca saw little of the beating before defendant chased him away (Tr. at 96-98). Tilley saw only ten to fifteen seconds of the beating (Tr. at 160). Anderson saw the most, although even he saw only three-quarters of the fight (Tr. at 133). The discrepancies defendant points to are consistent with witnesses who saw different angles and different parts of a single event. Even if counsel had pointed out the discrepancies, there is no reasonable probability that the jury would have returned a different verdict. See State v. Wynia, 754 P.2d 667, 671-72 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (1988).

C. Calling character witnesses.

Defendant claims ineffective assistance of counsel because trial counsel did not call character witnesses "despite the obvious need for character testimony" (Br. of App. at 72). He claims that he requested that counsel call character witnesses, but there is no record of such a request. Neither does defendant allege how calling character witnesses would have resulted in a different verdict at trial. His failure to demonstrate prejudice by counsel not calling character witnesses nullifies his claim. See Frame, 723 P.2d at 405.

D. Objection to alleged prosecutorial errors.

Defendant again fails to demonstrate prejudice in his claim that trial counsel failed to object to prosecutorial errors. "It is not enough to claim that the alleged errors had some conceivable effect of the outcome or could have had a prejudicial effect of the fact finders. To be found sufficiently prejudicial, defendant must affirmatively show that a 'reasonable probability' exists that, but for counsel's error, the result would have been different." Id. Defendant's conclusory assertions that his counsel was deficient and "prejudiced the trial to such as extent that the verdict cannot be relied upon," does not affirmatively show how his trial was prejudiced by counsel's failure to object. Failure to demonstrate prejudice negates defendant's claim that trial counsel provided ineffective assistance.

POINT V

THE TRIAL COURT PROPERLY RESPONDED TO THE QUESTIONS POSED BY THE JURY DURING ITS DELIBERATIONS.

Defendant maintains that the trial court failed to provide the guidance that the jury sought when it sent out notes during its deliberation. The record shows that trial counsel did not object to the manner in which the court handled the questions which the jury posed (Tr. at 671-75). Trial counsel even participated in fashioning a response to the questions which provided the statutory definition of "serious bodily injury" (Tr. at 672-75 and R. at 300).

> "A general rule of appellate review in criminal cases in Utah is that a

> contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record before an appellate court will review such claim on appeal."

State v. Johnson, 774 P.2d 1141, 1144 (Utah 1989) (emphasis in original) (quoting State v. Tillman, 750 P.2d 546, 551 (Utah 1987)). Defendant's failure to object to the manner in which the court responded to the jury's questions waives appellate review of this issue.

Even if this issue had been preserved for review, defendant's claim is without merit. See State v. Couch, 635 P.2d 89, 93, n.5 (Utah 1981). The record demonstrates that the trial court did respond to the jury's questions with more than a "terse[] direct[ion to the jury] to reread the instructions already given" (Br. of App. at 74). The trial court worked with counsel to prepare a response to the jury which was then given to the jury in written form (Tr. at 671-75 and R. at 300). As to other questions which were asked by the jury, the trial court properly referred the jury back to the instructions which answered their questions.

In State v. Couch, 635 P.2d 89 (Utah 1981), the supreme court remanded the case because the trial judge refused to define the word "genitals" for the jury. The court noted that the law regarding responses to jury requests had been changed; however, that case presented a circumstance "in which, even under the current statute, the court should 'respond to the inquiry.'" Id. at 94, n.9. The provision regarding jury questions is now found in rule 17(m), Utah Rules of Criminal Procedure, which reads:

> After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

In Couch, the supreme court drew from the United States Supreme Court when it stated:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."

Id. at 94 (quoting Bollenbach v. United States, 326 U.S. 607, 612-13 (1946) (emphasis added in Couch)). The trial judge must provide guidance through its instructions on the law. If the original instructions provide that guidance, the court may properly decline to give supplemental instructions.

In Couch, the word about which the jury had a question was a word "susceptible of differing interpretations, only one of which is a proper statement of the law"; in that circumstance, an additional instruction was required. Couch, 635 P.2d at 94. Further review of the instructions already given could not have assisted that jury in arriving at the correct legal

interpretation of the word. In the present case, the words about which the jury had question could be answered by further review of the original instructions. The first note referred to Instruction #15 and asked, "The concluding words 'cause the result', does 'result' mean death or bodily injury or what?" (R. between [the notes are unnumbered] 298-99). Instruction #15 defines culpable mental states using the language of the statute, Utah Code Ann. § 76-2-103 (1990). The judge's response was to refer the jury to the "language of the charge [they were] considering" (R. between 298-99). The jury had been instructed on the charged offense of second degree murder (R. at 317 and 320-21), on the lesser included offense of manslaughter (R. at 326-27), on negligent homicide (R. at 328), on aggravated assault (R. at 329-20), and assault (R. at 331). These different offenses have different culpable mental states. The court properly referred the jury to the language of whichever offense they were considering to determine which mental state applied; from that, they could determine the meaning of the word "result" in Instruction #15. Given the plethora of offenses the jury was considering, the court could not be more specific in defining "result" for the jury. He could properly refer them to whichever specific offense instruction they were considering in order to determine the correct definition of the word in the context of that offense.

The second note asked, "Do you have to <u>intend</u> to kill someone to be convicted of second degree murder?" The court referred the jury to the culpable mental state described in

Instruction #2 (R. between 298-99). That instruction told the jury that the culpable mental states were either "intending to cause serious bodily injury to Miguel Ramirez, . . . or acting under circumstances evidencing a depraved indifference to human life" (R. at 317). The court's response answered the jury's question as to the requisite mental state to convict this defendant of second degree murder. It was in response to this question that defense counsel asked for and received the supplemental instruction defining "serious bodily injury" (Tr. at 671-75 and R. at 300).

The final question referred to the elements instruction (R. at 320-21), and asked in apparently geometric terms about the interplay between the subparagraphs of the instruction (R. between 298-99). The jury appeared to be trying to read the instruction as an equation in which certain subparagraphs added up to equal another subparagraph. The jury's attempt to read the instruction as an equation could not be answered other than to ask the jury to consider the basic instructions as they had been given them (R. at 299). The court could not tell the jury that they were reading too much into the instruction, it could only ask them to look at the instruction again.

The trial court did not ignore the jury's requests for guidance; instead, the court gave the guidance which it could properly give. There is no error in the manner in which the court responded to the jury's questions.

POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE MANNER IN WHICH IT ALLOWED THE JURY TO DELIBERATE.

Defendant next contends that the trial court abused its discretion by allowing the jury to deliberate until 1:20 a.m. after four days of trial (Br. of App. at 76). This Court, in State v. Lactod, 761 P.2d 23 (Utah Ct. App. 1988), stated:

> While it is well-established that the length of time a jury may be kept together for deliberation is discretionary with the trial judge, he may not coerce the jury into returning a verdict because this amounts to a denial of a fair and impartial jury trial and is therefore, a denial of due process.

Id. at 31 (citing Mills v. Tinsley, 314 F.2d 311, 313 (10th Cir.), cert. denied, 374 U.S. 847 (1963)). The trial court may keep a jury together for deliberation as long as the length of time does not become coercive. There is not, as defendant seeks, a specific time limit beyond which the length is automatically coercive and automatically a denial of due process.

Whether the trial court abuses its discretion by allowing continued deliberation is based on the facts of a given case. In the case cited by defendant, Isom v. State, 481 So.2d 820 (Miss. 1985), the jury had deliberated for over seven hours when they asked the court to allow them to retire for the evening. The court required them to return to deliberation, then called them back into court to instruct them that they must reach a decision. These facts made the length of deliberation coercive, not the mere fact of the amount of time which had passed.

In the present case, the jury retired to deliberate on the fourth day of trial (R. at 294 and Tr. at 669). The record demonstrates that the jury sent three notes to the court for clarification of the instructions (R. between 298-99 and Tr. at 671-75). There is nothing in the record regarding any request by the jury to retire from deliberation. There is no hint of coercion by the court to force the jury to continue deliberations beyond a request to cease. Defendant has not and cannot point to any record support for an assertion that the court coerced the jury into reaching a decision by prolonging their deliberation.

Defendant asks this Court to presume that the length of time must have caused the jury to be less alert, and to assume that some jurors were forced to continue by others who "wanted to get the job over and done with at the expense of the Appellant" (Br. of App. at 76). Nothing in the record supports these conclusions; in fact, the opposite is demonstrated by the record. The notes sent to the court by the jury during deliberation are evidence that the jurors were giving careful thought to the evidence and instructions which they had been given. The jurors were polled as to whether the verdict was each of theirs individually and they answered in the affirmative (Tr. at 675-76). Defendant received his constitutional right to the "considered judgment of each juror" (Br. of App. at 76).

POINT VII

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW THE JURY TO VIEW THE CRIME SCENE.

Defendant argues that the court erred in refusing to

let the jury view the scene of the crime.[4] Once again, defendant's claim lacks merit.

Rule 17(i), Utah Rules of Criminal Procedure, provides the guideline for permitting a jury to visit a crime scene:

> When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

The decision to allow jurors to view a crime scene lies in the sound discretion of the trial court and will not be overturned unless the trial court "palpably" abuses its discretion. See State v. Roedl, 107 Utah 538, 155 P.2d 741, 746 (1945). Other states have adopted a similar standard. State v. Mauro, 159 Ariz. 186, 766 P.2d 59, 77 (1986); People v. Cisneros, 720 P.2d 982, 984 (Colo. Ct. App.), cert. denied, 479 U.S. 887 (1986); State v. Stoudamire, 30 Wash. App. 41, 631 P.2d 1028, 1031 (1981).

In the instant case, defendant has not demonstrated how he was prejudiced by the lower court's refusal to allow the jury to visit the crime scene. He merely concludes that the evidence is weak and that viewing the scene would have helped the jury

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[4] Since defendant provides no legal analysis or authority for his claim, this Court may refuse to consider the issue. State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984).

POINT VIII

THE DOCTRINE OF CUMULATIVE ERROR DOES NOT APPLY TO THIS MATTER BECAUSE THE CLAIMS RAISED BY DEFENDANT EITHER WERE NOT ERROR OR WERE NOT PREJUDICIAL.

Defendant's final point is that if none of the errors he alleges were reversible errors, their cumulative impact constituted reversible error. A similar argument was rejected in State v. Rammel, 721 P.2d 498, 501-502 (Utah 1986), when the supreme court held that the cumulative error doctrine does not apply when no substantial errors were committed. As argued above, the errors claimed by defendant either were not errors at all or were not prejudicial; consequently, taken together they do not constitute cumulative reversible error.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY submitted this 3d day of April, 1991.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Robert Michael Archuleta, Attorney for defendant, 431 South 300 East, Suite 401, Salt Lake City, Utah 84111, this 3rd day of April, 1991.

Marlene Barlow